

**Meeting of the Central Valley Flood Protection Board
November 21, 2008**

Staff Report

Item

Consider whether the Board will require assurances regarding operation and maintenance and indemnity from the members of a joint powers agency as well as from the joint powers agency itself.

Background

Various sections of the Water Code require that where the State, acting through the Board, offers assurances to the U.S. Army Corps of Engineers that it will operate and maintain a project and will indemnify the Corps for any losses or damages, the State shall obtain similar assurances from the local sponsor of the project. (See Water Code §12828.) In several instances, local agencies have entered a joint powers agreement and formed a regional flood control agency as a joint powers agency separate from the individual members. The joint powers agency has then applied for a permit from the Central Valley Flood Protection Board. The question has arisen whether the Board should require the individual members of the joint powers agency to execute the required assurance agreements, or whether an assurance agreement with the joint powers agency is sufficient.

Discussion

Local Project Cooperation Agreements (LPCAs). The United States requires the State, through the Board, to offer assurances that it will maintain project facilities and will indemnify the United States. State law requires the Board to pass these obligations to another public agency. The purpose of Local Project Cooperation Agreements (LPCAs) is to insure that an entity other than the Board will maintain the project and provide the necessary indemnities to the Board.

Joint Powers Agencies. The Joint Exercise of Powers Act, Government Code sections 6500 et seq., authorizes two or more public agencies to enter an agreement to jointly exercise any power common to the contracting agencies. Sometimes, but not always, the joint powers agreement creates a new agency, such as TRLIA, SAFCA or WSAFCA. Where the joint powers agency is not one of the parties to the agreement, its debts, liabilities and obligations will be the debts, liabilities and obligations of the parties to the agreement, unless the agreement specifies otherwise. In almost all cases, the agreement does specify otherwise. In other words, the agreement states that the obligations of the joint powers agency are not obligations of its members. There is one major exception: Government Code section 895.2 does provide that where a joint powers agency or one of its members commits a negligent or wrongful act or omission in the performance of the agreement, all the member agencies will be liable,

notwithstanding the terms of the agreement. Moreover, the Water Code does provide that individual members may separately contract for, or assume responsibility for, specific liabilities or obligations of the agency.

Arguments in favor of requiring member agencies to sign the LPCA as a condition of granting a permit to a joint powers agency.

(1) In order for the LPCA to be effective, the local entity must be willing **and able** to carry out its responsibilities under the agreement. If the joint powers agency does not have the financial resources to carry out those obligations, its agreement to do so offers the State no real assurance that those obligations will be met. If the ability of the JPA to meet the obligations of the LPCA, now or in the future, is doubtful, it is reasonable for the Board to require the members of the JPA to also execute the LPCA.

(2) If the joint powers agency were to go out of existence, and it was the only party to the LPCA, there would be no longer be any local agency obligated to provide the O&M and indemnity.

(3) The member agencies are often the proponents of and beneficiaries of the project.

Arguments against requiring member agencies to sign the LPCA.

(1) The individual members of the JPA may also have limited resources, so their ability to hold the state and federal governments harmless in the event of a flood disaster is limited.

(2) An individual member of the JPA often does not have sufficient votes to control the actions of the JPA Board, and thus does not control the design or construction of the project and should not be held responsible for any flaws in those activities.

(3) In agencies with a large geographic reach, a particular project in one area of the agency may not benefit members located in another area.

Different treatment of different JPAs. The decision whether to require the members of a particular JPA to execute the LPCA will turn on the likely ability of the JPA itself to provide the required maintenance in the long term and to provide the indemnity if required in the future. In one case, the JPA may have sufficient resources and a track record showing its ability to perform; in another case, there may be doubt that the JPA will be able to successfully undertake the obligations in the LPCA or will continue to exist in the future. In JPAs with a large geographic reach, it may be reasonable to require agreements from only those members in the area to be benefited. These decisions may be made on a case by case basis, since the JPAs are different from each other. Where circumstances are different, fairness does not demand that the determinations be the same.

Effect of AB 70, the Jones bill. The Jones bill provides that “a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood to the extent that the city or county has increased the state’s exposure to liability for property damage **by unreasonably approving new development** in a previously undeveloped area that is protected by a state flood control project.” (Emphasis added.) However, the city or county will not be required to contribute if it does not act unreasonably, as defined in the act, or the property is not in an undeveloped area, as defined, or the project application was submitted prior to January 1, 2008, or the city or county complies with certain sections of the Government Code.

The legislative history reveals that this bill was intended to preserve local land use authority, while minimizing the State’s exposure to flood liability resulting from unreasonable local land use decisions which place additional development in harm’s way behind known inadequate levees. The bill saves cities and counties from liability for property damages caused by flood as a result of their *land use decisions*, unless unreasonable.

. It may happen that one of a JPA’s member agencies is a city or county. If the Board decides to require a city or county to execute an LPCA as a member of a joint powers agency, as it has done for some projects in the past, the city or county would not be assuming obligations because of its land use decisions, but because it is a project proponent and/or a major source of funding and/or a beneficiary of the project. The Jones bill does not address these circumstances.

Conclusion.

The Board may make a policy decision regarding whether to require the members of a joint powers agency to execute an assurance agreement as a condition of the permit to the JPA. It may take into account the circumstances in each case.